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Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERT THOMAS CALDWELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

LOUIS ELIAS LOPEZ
Counsel of Record
300 East Main, Suite 700
El Paso, Texas 79901
(915) 543-9800

Attorney for Petitioner
Robert Thomas Caldwell

QUESTION PRESENTED

1) When the Government prosecutes a violation of Title 22 U.S.C. § 2778(b)(2), the exportation of a United States Munitions Listed Item without a license, and relies on boiler plate language printed on a pro forma invoice to serve as notice to the defendant of licensing requirements, what constitutes a sufficient warning so that a jury may infer that a defendant acted with specific intent when there is a split of opinion between the United States Fifth Circuit Court of Appeals and the United States Second and Eleventh Circuit Courts of Appeals regarding this issue?

PARTIES TO THE PROCEEDINGS

Petitioners (defendant and appellant below):

ROBERT THOMAS CALDWELL

Represented by LOUIS ELIAS LOPEZ, 300 East Main, Suite 700, El Paso, Texas 79901

Respondent (plaintiff and appellee below):

THE UNITED STATES OF AMERICA

Represented by the Office of the Solicitor General, 950 Pennsylvania Ave., NW, Washington, D.C. 20530-0001

and

Mr. Johnny Sutton, United States Attorney for the Western District of Texas, and Mr. Joseph Gay, Assistant United States Attorney for the Western District of Texas, United States Attorney's Office, 601 NW Loop 410, Suite 600, San Antonio, Texas 78216

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CITATIONS FOR OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix A); the Order denying the Petitioner's Motion for Judgment of Acquittal and New Trial (Appendix B); the Petitioner's Judgment and Sentence (Appendix C); and the Order of the Court of Appeals denying the Petitioner's Motion for Rehearing *en banc* (Appendix D) were not reported.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals filed its opinion on October 9, 2008. That Court denied the petitioner's petition for rehearing and rejected the suggestion for hearing *en banc* on November 10, 2008. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on writ of certiorari the opinion of the Court of Appeals.

STATUTORY PROVISION AT ISSUE

The underlying action arose from the Government prosecuting the petitioner for violating the exporting restrictions contained in 22 U.S.C. § 2778(b)(2). 22 U.S.C. § 2778(b)(2) specifically states:

> "Except as otherwise specifically provided in regulations issued under subsection (a)(1) of this section, no defense articles or defense services designated by the President under subsection (a)(1) of this section may be exported or imported without a license for such

> export or import, issued in accordance with this chapter and regulations issued under this chapter, except that no license shall be required for exports or imports made by or for an agency of the United States Government (A) for official use by a department or agency of the United States Government, or (B) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means."

The petitioner alleges that the United States Fifth Circuit Court of Appeals' opinion regarding the necessary intent requirement to sustain a conviction in this case is in direct conflict with those of the Second and Eleventh Circuit Court of Appeals.

STATEMENT OF THE CASE

A grand jury returned an indictment charging the appellant, in two counts of a three count indictment,[1] of violating 18 U.S.C. § 2, 18 U.S.C. § 371 and 22 U.S.C. § 2778 by conspiring to, and or aiding, the exportation of United States Munitions List batteries out of the United States without a license. (TR Vol. 1, pg. 55). The appellant proceeded to trial where a jury acquitted the appellant of count one, conspiracy, and found him guilty of count two, aiding and abetting.

[1] Appellant Caldwell was not charged in count III and as a result, count III is not discussed.

(TR Vol. 1, pg. 153). At the appellant's sentencing hearing, the Court sentenced the appellant to a 20-month term of imprisonment, a two-year term of reporting supervised release, and a special assessment of $100 (Appendix C). The appellant timely appealed. (TR Vol. 1, pg. 237).

A factual understanding of the circumstances of this case is necessary so as to understand how the Courts of Appeals opinions differ. Roughly put, this case is about weapons and their parts; the exportation of these weapon systems; and a well intentioned but misguided governmental sting operation. The governmental operation started with the intention of ensnaring criminally minded business persons seeking to skirt United States export regulations. However, the operation overreached and ensnared an innocent man.[2] In order to understand this case, the Court must first understand a brief history behind the procurement and exportation of United States weaponry.

Throughout its history, the United States has sold various weapons and weapon components to various allies throughout the world. Many of these weapon systems, and their parts, were out-dated, old, or of little value to the United States. (CR Vol. 2, pg.

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[2] "It is the invariable habit of bureaucracies, at all times and everywhere, to assume . . . that every citizen is a criminal." Mencken, Henry Louis, *Prejudices: Sixth Series, "Life under Bureaucracy"*, pgs. 241-2.

123). However, many of these weapon systems found their way into unfriendly hands. (CR Vol. 3, pgs. 155-156). And not surprisingly, the need for parts for these weapon systems created a robust black market. (CR Vol. 3, pg. 163).

As a result, the Government enacted the International Traffic and Arms Regulation Act (ITAR). (CR Vol. 2, pg. 108). Within ITAR, Congress created a list called the United States Munitions List (USML). (CR Vol. 2, pg. 108). The USML describes items that require export licenses. (CR Vol. 2, pg. 108). Additionally, ITAR regulates end users, i.e., a list of persons and countries prohibited from receiving exported USML items. (CR Vol. 2, pg. 118). This allowed the State Department to monitor who was exporting and receiving USML items from the United States. (CR Vol. 2, pgs. 112-113).

Not content with playing a reactive role, the Department of Homeland Security began to take a proactive approach to monitoring the flow of weaponry, and weaponry parts, from the United States. (CR Vol. 2, pg. 112). As part of Project Shield America, the Immigration and Customs Enforcement agency (ICE) began creating fictitious internet companies. (CR Vol. 1, pg. 72). The only purpose of these companies was to attract criminally minded business persons who were looking to buy USML items and export them out of the United States without going through the necessary licensing requirements. (CR Vol. 1, pg. 74). Many of these items either have military purposes, i.e., missiles, or dual purpose which means

they could be used for military and civilian purposes. (CR Vol. 1, pg. 75). ITAR requires that if a person wants to export out of the United States an item that is used for military or dual purposes, the item must be licensed through the State Department or the Commerce Department. (CR Vol. 1, pg. 74).

According to ICE Agent Ronald Marcell, a witness for the Government, one of these fictitious companies was Mercury Global Enterprises. (CR Vol. 1, pg. 76). Mercury Global was a web based company with a P.O. Box, phone number and bank account located in El Paso, Texas. (CR Vol. 1, pg. 76). Its purpose was to act as a shady company that would sell USML items for export out of the United States as long as the shipper would not obtain the required export licenses.

In December 2005, Chris Tappin, a British merchant/shipper, contacted Mercury Global using a proxy by the name of Robert Gibson. (CR Vol. 1, pg. 82). Gibson was interested in purchasing a "Gimble" device. (CR Vol. 1, pg. 78). A "Gimble" device is a camera that is attached to a machine that allows the camera to rotate 360 degrees, record data and transmit the data to an end user. (CR Vol. 1, pg. 78). The "Gimble" is used for missile testing and is a USML item. (CR Vol. 1, pg. 78). During these discussions, Mercury Global and Gibson negotiated price; how to skirt licensing requirements; and create "double invoices." (CR Vol. 1, pg. 87). With regards to the "double invoices," the word "double" was not used as it is defined. According to Merriam-Webster's Dictionary,

the word "double" is defined as "2: one that is the counterpart of another: duplicate."[3] Therefore, the term "double invoicing" would mean identical duplicate invoices.[4] However, when Mercury Global used the word "double" in "double invoicing," the Company meant using two distinctly different invoices – one which is the actual invoice and a different false invoice which is used to fool custom agents. (CR Vol. 1, pg. 87). Thus, much credence should be given to Humpty Dumpty when he tells Alice that words can mean anything because "he who is master" defines the words.[5]

In any case, during the procurement of the "Gimble" device, Gibson negotiated for the purchase of Yardney 329A silver-oxide batteries, otherwise known as HAWK missile batteries. (CR Vol. 1, pg. 96). Mercury Global informed Gibson that they could not get Yardney batteries, but could get Eagle Picher batteries which were the same thing. (CR Vol. 1, pg. 98). The battery is an inert battery with a 13-year shelf life. (CR Vol. 1, pg. 101). The battery's chemicals are separated when stored, but when activated, the chemicals mix to provide for a short single blast of

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[3] http://www.merriam-webster.com/dictionary

[4] This is exactly what appellant Robert Caldwell understood the term to mean when it was used later on during his purchase from Mercury Global the Eagle Picher GAP-4328 inert batteries. (CR Vol. 3, pg. 11).

[5] Carroll, Lewis, *Through the Looking Glass*, Dover Publications. (May 14, 1999).

energy for 110 seconds – a kind of firing mechanism used to launch the HAWK missile. (CR Vol. 1, pg. 104). Mercury Global, with Marcell as its representative, discussed with Gibson all details of the sale of the batteries including the need for licenses. (CR Vol. 1, pg. 106). Specifically, Marcell told Gibson, "Hey, these are licensable," whereas Gibson replied, "That's fine. That's what I'm paying the extra money for." (CR Vol. 1, pg. 106). At all times during the "Gibson" part of the sting, the conversations were open and to the point. (CR Vol. 1, pg. 106). Arrangements were made for Gibson to travel to New York and purchase the batteries. (CR Vol. 1, pg. 107). Upon arriving in New York, Gibson inspected the batteries, paid for them and was arrested. (CR Vol. 1, pg. 108). Marcell testified in trial that he thought that Gibson's arrest ended the investigation. (CR Vol. 1, pg. 109). However, to everyone's surprise, Marcell was contacted again, but this time by Chris Tappin himself. (CR Vol. 1, pg. 109).

Tappin inquired about the Eagle Picher batteries that Gibson was to procure, as well as the "Gimble." (CR Vol. 1, pg. 109). After discussing the shipment of the "Gimble," both parties agreed to label it "camera equipment" for exporting purposes. (CR Vol. 1, pg. 116). When it came to the batteries, Tappin asked Gibson what the batteries' use was. (CR Vol. 1, pg. 117). Marcell answered: "There is only one use . . . they're for the HAWK missile." (CR Vol. 1, pg. 117). A ruse was used to delay the delivery of Gibson's batteries – i.e., Marcell told Tappin that the Gibson

batteries were seized by US Customs and a fine would need to be paid. (CR Vol. 1, pg. 118). Additionally, Marcell told Tappin that they needed a new shipper as Mercury Global was having problems with its shipper. (CR Vol. 1, pg. 118). Tappin stated that he would find somebody. (CR Vol. 1, pg. 118).

Eventually, Tappin gave Mercury Global the name of a shipping company called Southeast Overseas. (CR Vol. 1, pg. 119). Through a series of e-mails, Mercury Global, now using ICE Agent Chris Mosley, contacted Southeast Overseas and began negotiating the exportation of inert GAP 4328 batteries, which were the same Eagle Picher batteries Gibson was trying to obtain. (CR Vol. 3, pg. 164). In their discussion, Mercury Global, i.e., through its ICE Agent Mosley, verbally told Southeast Overseas that the batteries need an export license. (CR Vol. 3, pg. 166). After being provided with all the facts, Southeast Overseas declined to bid. (CR Vol. 3, pg. 163). Upon being informed about the Southeast Overseas' declination, Tappin stated that he had another person. (CR Vol. 1, pg. 119). Tappin stated that they would be contacted by Robert Caldwell, a fertilizer importer from Oregon. (CR Vol. 1, pg. 119).

Robert Caldwell, who had done some legitimate work with Chris Tappin in the past, contacted Mercury Global in December 2006. (CR Vol. 1, pg. 123; CR Vol. 2, pgs. 103, 202-204; CR Vol. 1, pg. 222). The Government proceeded to negotiate with Caldwell despite the fact that the Government knew nothing about Caldwell. (CR Vol. 1, pg. 124; CR Vol. 2, pg. 64).

However, the one thing the Government did know about Caldwell, according to Mosley's testimony, was that Caldwell was not a freight forwarder/shipper. (CR Vol. 2, pg. 6; CR Vol. 1, pg. 124). Caldwell was going to act as a buyer for the batteries and then arrange for their shipment to Tappin in the United Kingdom by using Murphy's Shipping Company out of Houston, Texas. (CR Vol. 1, pg. 126). Throughout the testimony, the agents, as well as Tappin, were adamant that the freight forwarder/shipper know that the batteries needed a license. (CR Vol. 2, pgs. 9 and 18). Specifically, Mosley testified that Tappin specifically wanted to make certain that the freight forwarder knew the batteries required export license; that they (the conspirators) were protected; and all the precautions are met. (CR Vol. 2, pg. 9). But despite this desire to be open, the Government was much oblique in their dealings with Caldwell. (CR Vol. 1, pg. 128). Rather than come out and tell Caldwell the batteries were for HAWK missile systems, as they had with Gibson (CR Vol. 1, pg. 180) or verbally tell him that the batteries needed licenses, as they had with Southeast Overseas Shipping (CR Vol. 2, pg. 22), the Government snuck the licensing requirement notice within boiler plate export language on the bottom of a pro forma invoice which was then faxed to Caldwell. (CR Vol. 1, pgs. 128, 186-187). This hide-the-ball attitude permeated the Caldwell part of the conspiracy even though Agent Mosley testified that he "wanted to make certain that the freight forwarder knew that the batteries required an export license . . . to make sure anyone in the conspiracy had knowledge."

(CR Vol. 2, pgs. 9, 33, 43, 44). And yet, Agent Mosley previously stated that during an investigation, agents are never "up-front" with persons dealing in illegal transactions because the agents don't want to "hink-up" the person – that is, make the person suspicious of the transaction therefore blowing the operation and the agent's cover. (CR Vol. 1, pg. 204). Specifically, Agent Mosley testified that he was not going to tell Caldwell that these items are going overseas without an export license. (CR Vol. 1, pg. 205). But then Mosley testified that he did tell Caldwell that it was illegal to export these items without a license. (CR Vol. 1, pgs. 205-206). However, Caldwell e-mails Agent Mosley and states he is not familiar with the licensing details. (CR Vol. 2, pg. 72). Agent Mosley responds by saying "because Caldwell mentions licensing issues, he must know what they" [are] even though he is unfamiliar with them. (CR Vol. 2, pg. 72). This back-and-forth discreet play was being employed so as to not "hink-up" Caldwell. (CR Vol. 1, pg. 205). Yet Agent Mosley stated that he and Tappin freely discussed mislabeling the batteries and changing the packaging (CR Vol. 2, pg. 12) as well as licensing issues. (CR Vol. 2, pgs. 20, 28).

When Agent Marcell was asked if he notified Caldwell that the batteries were for HAWK missiles, Agent Marcell testified, "Yes . . . on the warning located on the pro forma invoice." (CR Vol. 1, pgs. 186-187). However, the pro forma invoice did not refer to the batteries as HAWK missile batteries but instead as GAP 4328 inert batteries and the notice said

nothing about their purpose or usage. (CR Vol. 1, pg. 127). The warning Marcell referred to specifically read:

> "Export of the commodity as described herein is strictly prohibited without a valid export license issued by the U.S. State Department Office of Defense Trade Controls, prescribed in the International Traffic and Arms Regulation, ITAR, Title 22, Code of Federal Regulations, part 120 to 130." (CR Vol. 1, pgs. 128-129).

The Government, throughout its testimony, insisted that this notice provided everyone with knowledge that the item was for military purposes and needed to meet the licensing requirements. (CR Vol. 1, pg. 187). However, the Government admitted that one had to assume the reader knew that military weapons, and their parts, are part of the ITAR. (CR Vol. 1, pg. 187). Caldwell informed Agent Mosley that he had some concerns about the wording of the pro forma invoice and would talk to Tappin. (CR Vol. 1, pg. 129). Interestingly, Mike Severs of Murphy Shipping, a shipper with 25 years of experience, did not even notice the export notification contained in the pro forma invoice when he was presented with the pro forma invoice during his testimony. (CR Vol. 2, pg. 194).

Additionally, the Government knew Murphy Shipping was the end shipper/forwarder. (CR Vol. 1, pg. 133). In fact, Caldwell had contacted Murphy Shipping and had asked for help with the exportation procedures. (CR Vol. 2, pg. 191). Mr. Severs testified

that it appeared Caldwell did not know what to do and was looking for guidance. (CR Vol. 2, pg. 191).

During the sting operation, the parties began referring to the sale of the batteries to Caldwell as a "domestic sale." (CR Vol. 1, pgs. 156, 225). And upon Tappin's instruction, Caldwell began calling the batteries Tideland batteries and began making arrangements for their shipment from Mercury Global in El Paso, Texas to Houston, Texas where they would eventually be exported out of the United States to the United Kingdom by Murphy Shipping. (CR Vol. 1, pgs. 133-134). During the negotiations, several facsimiles were exchanged between Tappin and Caldwell. One of the facsimiles admitted into evidence contained a statement from Caldwell asking Tappin, "Please apprise me of the details of this enterprise, e.g. what are, what Jason referred to as 'other parameters' of this project? Such issues could not freely discuss on phone. Jason [Agent Chris Mosley] said I speak with you about intricacies." (CR Vol. 1, pg. 153). From the onset, Mosley was not forthcoming with information about the batteries or their export status with Caldwell. (CR Vol. 2, pg. 87). In fact, despite wanting every player in the conspiracy to have knowledge, Agent Mosley completely relied on co-conspirator Tappin to fully explain the licensing problem to Caldwell. (CR Vol. 1, pgs. 209, 223). With no evidence to state otherwise, Agent Mosley assumed that Tappin told Caldwell about the illegalities of shipping missile batteries without a license. (CR Vol. 1, pg. 214). Even Agent Mosley admitted that

Tappin told him that he had not explained everything about the batteries to Caldwell. (CR Vol. 2, pg. 30). And later, Agent Mosley admitted that he has no idea what Tappin told Caldwell (CR Vol. 2, pg. 101) and he also does not know the extent of Caldwell's full knowledge. (CR Vol. 2, pg. 101).

Eventually, after the exchange of many e-mails and fax, Caldwell agreed to meet with Agent Mosley in San Antonio, Texas for dinner. (CR Vol. 1, pg. 139). Prior to the meeting, Caldwell informed Agent Mosley that he was going to EGL Shipping Company in San Antonio to discuss the export details. (CR Vol. 2, pg. 92; Vol. 3, pg. 19). Agent Mosley agreed to go with him and work through the exporting issues if necessary. (CR Vol. 2, pg. 92; Vol. 3, pg. 19). However, they did not go to EGL Shipping in San Antonio as Mosley changed the initial meeting time from dinner to lunch. (CR Vol. 3, pg. 20). At the lunch meeting between Caldwell and Mosley, Caldwell gave Mosley a check from Caldwell's business account for $5,000. (CR Vol. 1, pg. 87). At trial, Agent Marcell testified that this money was for payment of the New York fines for the Gibson batteries. (CR Vol. 1, pg. 140). Agent Mosley, however, had a difficult time identifying what the check was for. He initially testified that the check was for payment of the five Caldwell batteries. (CR Vol. 1, pg. 231). Subsequently, Agent Mosley changed his testimony and stated that the check was for the Gibson fines. (CR Vol. 2, pg. 16). But later in his testimony, Agent Mosley could not even answer the simple question, "what was the $5,000 for?" (CR

Vol. 2, pgs. 77-80). In fact, the Government was not certain who the money belonged to in the first place. (CR Vol. 1, pg. 140).[6] It appears that the Government, by creating this confusion as to "what the money was for" tried to discourage the idea that the transaction was merely a domestic sale because if it was a domestic sale, the transaction was not illegal. (CR Vol. 2, pg. 121).

Marcell testified that Agent Mosley later handed Caldwell paperwork which described the batteries and that the paperwork was to go to Tappin and not accompany the batteries. (CR Vol. 1, pg. 140). The plan was to make sure that the identifying paperwork did not travel with the batteries. (CR Vol. 1, pg. 140). Additionally, Mosley asked Caldwell if he was familiar with all the shipping details and Caldwell replied that he knew that the batteries were to go to Houston, Texas. (CR Vol. 2, pg. 100). When asked if he planned on obtaining export licenses for this deal, Caldwell stated that he was not planning on it. (CR Vol. 1, pg. 188). However, one must remember that the plan at this point was not for batteries from Mosley to Caldwell to Tappin; Caldwell was still going to use Murphy Shipping in Houston, Texas for exporting the batteries. (CR Vol. 2, pg. 6). Even though a license was not needed at the Mosley-Caldwell

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[6] Agent Marcell testifies that he presumes its Tappin's money being delivered by Caldwell (CR Vol. 1, pg. 140) but offers nothing to support this presumption.

exchange. (CR Vol. 2, pg. 121). Caldwell was still arrested at this point. (CR Vol. 1, pg. 233).

REASONS FOR GRANTING CERTIORARI

The Government prosecuted the petitioner for a violation of Title 22 U.S.C. § 2778(b)(2), the exportation of a United States Munitions Listed Item without a license. To prove that the petitioner specifically intended to violate Section 2778(b)(2)'s licensing requirements, the Government relied on the boiler plate language printed on a pro forma invoice to serve as notice to the defendant of licensing requirements. The United States Fifth Circuit Court of Appeals' opinion held that the warning contained in the notice was sufficient to provide the petitioner with the knowledge that the items listed on the invoice needed licensing. (Appendix A pages 15-16). This opinion is in direct conflict with those opinions in the United States Second and Eleventh Circuit Courts of Appeals regarding the same kind of notice.

A. Specific Intent is Required

In order to sustain a conviction under 22 U.S.C. § 2778, the Government must prove beyond a reasonable doubt that the defendant willfully exported or attempted to export defense articles that are on the United States Munitions List without a license. *U.S. v. Covarrubias*, 94 F.3d 172, 175 (5th Cir. 1996). *See also United States v. Ortiz-Loya,* 777 F.2d 973, 980

(5th Cir. 1985); *United States v. Murphy,* 852 F.2d 1, 6 (1st Cir. 1988). Hence, when dealing with weapons on the munitions list and the issue of willfulness, specific intent is required. Furthermore, when the weapons covered by the statute are spelled out in administrative regulations, specific intent is also required. *U.S. v. Hernandez*, 662 F.2d 289, 292 (5th Cir. 1981). The statute requires the Government to prove that the defendant acted with specific intent to violate a known legal duty. *Id.*

In *U.S. v. Davis*, 583 F.2d 190, 193 (5th Cir. 1978) the court felt that because the items in the USML are covered by a statute; spelled out in administrative regulations; and include items not known generally to be controlled by the Government, Congress did not intend to impose criminal penalties on innocent or negligent errors. At best, the appellant made innocent errors, maybe even negligent errors, but he did not formulate the specific intent required to violate the law that he was charged with. Nowhere in the record is there evidence that the Government explicitly told the appellant that the batteries were USML items and that licenses were required for export. In fact, Agent Mosley admitted that Tappin told him (Mosley) that he (Tappin) had not told Caldwell anything about the batteries. (CR Vol. 2, pg. 30). And later, Agent Mosley admits that he had no idea what Tappin has told Caldwell (CR Vol. 2, pg. 101) and did not know his (Caldwell) full knowledge. (CR Vol. 2, pg. 101). Also, the Government's desire not to "hink-up" the operation led Agent Mosley to testify that during

an investigation, agents were never "up-front" with persons dealing in illegal transactions because the agents don't want to "hink up" the person – that is, make the person suspicious of the transaction therefore blowing the cover of the operation and the agents. (CR Vol. 1, pg. 204). Specifically, Agent Mosley testified that he was not going to tell Caldwell that these items are going overseas without an export license. (CR Vol. 1, pg. 205). Interestingly, both Agents Mosley and Marcell were very up front with Tappin, Gibson, and Overseas Shipping when discussing the batteries and licensing requirements; telling Gibson they were for HAWK missile systems (CR Vol. 1, pg. 180); and verbally told Southeast Overseas that the batteries needed licenses. (CR Vol. 2, pg. 22). There seemed to be no concern about "hinking-up" the operation when dealing with Tappin, Gibson and Overseas Shipping.[7] And specific intent to violate a known duty is required to sustain a conviction for

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[7] Interestingly, Chris Tappin never seemed to be "hinked up" at all, despite knowing Gibson was arrested in New York; had e-mail problems; that he lost money wired for the Gibson batteries, and that the agents change from Marcell to Mosley during the middle of the scheme. Seemed the only person the Government was worried about "hinking" was Caldwell. This is obviously clear when one realizes that after Mosley disclosed everything verbally to Overseas Shipping, Overseas bowed out. Thus, in order to insure the deal had a shipper/forwarder, the new guy had to be left out of the loop and given minimal facts. As Mosley testified, he had to rely on co-conspirator Tappin to fully explain the licensing problem to Caldwell. (CR Vol. 1, pgs. 209, 223).

attempted export or aiding and abetting an attempted export. *U.S. v. Davis*, 583 F.2d 190, 193 (5th Cir. 1978).

The appellant recognizes that direct proof of specific intent is often difficult to prove and that the Government must be able to rely on circumstantial evidence and inferences from attendant facts. *See United States v. Beck,* 615 F.2d 441, 449 (7th Cir. 1980) (criminal intent is often difficult to demonstrate by direct proof; it may be inferred from the attendant facts and circumstances.) In this case, the Government relied solely on the written notice printed on the bottom of a pro forma invoice that was provided to the appellant from Agent Mosley. The invoice warning specifically stated:

> "Export of the commodities described herein is strictly prohibited without a valid export license issued by the U.S. State Department, Office of Defense Trade Controls, prescribed in the international traffic in Arms Regulation (ITAR), Title 22, Code of Federal Regulations, Part 120-130." (CR Vol. 1, pgs. 128-129).

Agent Marcell, during his cross-examination, when asked whether he told the appellant about the licensing requirements his reply was that defendant was made aware by way of the pro forma notice. (CR Vol. 1, pgs. 186-187). However, Agent Mosley stated that he was not going to tell Caldwell that these items are going overseas without an export license. (CR Vol. 1, pg. 205). Additionally, the Government also relied on

the fact that the appellant put an asterisk next to the notice.

B. The standard created in the opinion of the Fifth Circuit differs from that of the standard created in the Second and Eleventh Circuits

The case directly on point is *United States v. Adames*, 683 F. Supp. 255 (USDC (Fla.) 1988), *aff'd*, 878 F.2d 1374, where the Government relied on a written notice to show specific intent to export without a license. In *Adames*, the defendant was charged with aiding and abetting her brother in an attempt to export firearms to Panama without a license from the Secretary of State. *Id.* at 256. The court in *Adames*, using Fifth Circuit precedent, established that specific intent to export without a license is required. *Id.* at 256. Specifically, Judge Scott stated: "In *United States v. Davis,* 583 F.2d 190 (5th Cir. 1978), a Fifth Circuit case which is controlling here, the court sustained convictions under an indictment charging that the defendants knowingly, willfully, and unlawfully exported articles on the Munitions List without obtaining a required export license, suggesting that specific intent is required, even though the opinion did not squarely address the question of degree of intent." *Id.* The *Davis* court went on to state that in *U.S. v. Lizarraga-Lizarraga*, 541 F.2d 826 (9th Cir. 1976), the Ninth Circuit held that § 1934's requirement of willfulness connotes a voluntary, intentional violation of a known legal duty . . . [and that] because

the items covered by the statute are spelled out in administrative regulations and include items not known generally to be controlled by the Government, the Ninth Circuit inferred that Congress did not intend to impose criminal penalties on innocent or negligent errors. *See U.S. v. Davis*, p. 193. (Judge Scott noted that § 1934 was the predecessor to § 2778.) Then, Judge Scott examined the evidence presented by the Government to show that Adames had specific intent to export items that required export licensing. *Adames,* at 256. The Government offered a "sales receipt for firearms" signed by Adames that had stamped on it: "Export Notice" which stated:

"EXPORT NOTICE"

> Certain Products may not be exported from the U.S.A. without specific approval from the Dept. of Commerce (Part 370. Export Administration Regulations) and/or Dept. of State (Title 22, Parts 121-128. (ITAR)). It is the BUYER'S responsibility, not the SELLER'S, to obtain such licensing unless agreed otherwise.
>
> Customer Signature *Id.* at 257.

The Government in *Adames* contended that this EXPORT NOTICE put Adames on reasonable notice of the requirement to obtain a license from the Secretary of State or, at least, inquire about such a requirement. *Id.* Additionally, the Government pointed to other circumstantial evidence which included the

Defendant's subsequent refusal to sign sales invoices acknowledging receipt of other firearms shipments; and to statements which the Government categorized as false exculpatory statements, thus, attempting to demonstrate a substantive consciousness of guilt by Adames. *Id.*

However, the court held that without the documentary evidence of the "EXPORT NOTICE" the Government would not have sufficient evidence to demonstrate the specific knowledge required to sustain a conviction under § 2778. *Id.* Thus, the court determined that the prosecution's case hinged on the wording of the export notice and whether such wording meets the requirements needed to prove specific intent. *Id.* Therefore, the court began an examination of the legislative history of § 2778 and the cases which have interpreted it. *Id.* The court found that knowledge has been proved generally in one of three manners: (1) the Defendant was specifically told of the requirement; (2) the Defendant was an expert in arms transactions and, therefore, was aware of the requirement; and (3) a written notice was provided to the Defendant as part of the arms invoice. *Id.* Applying this standard, the court found that no one told Adames that the exportation of the items was unlawful. *Id.* Second, the court found that Adames was not an expert or knowledgeable about licensing and arms shipping requirements. *Id.* The court stated that while "Ms. Adames is an intelligent woman who was vice-consul of Panama, this position does not catapult her into an expert in AECA." *Id.* Having found an

absence of a spoken warning to Adames and that Adames was not an expert in AECA, the court looked at the written notice provided by the EXPORT NOTICE. *Id.*

The court found that there existed only one decided opinion involving written notice at the time of his analysis, *United States v. Swarovski*, 592 F.2d 131 (2d Cir. 1979). *Adames* at 258. In *Swarovski*, the defendant was convicted of attempting to export a military aircraft gun-sight camera without a State Department license. *Id.* On the face of the invoice for the camera in bold type was the following language:

> "ABOVE ITEMS ARE OF U.S.A. ORIGIN AND MANUFACTURE. ABOVE PHOTOGRAPHIC EQUIPMENT IS UNDER UNITED STATES DEPARTMENT OF STATE MUNITIONS LIST CATEGORY NUMBER XIII(a), AND AS SUCH MUST BE EXPORT LICENSED BY THE U.S. DEPARTMENT OF STATE PRIOR TO EXPORT FROM THE UNITED STATES." *Id.*

Judge Scott compared the language in *Swarovski* with the EXPORT NOTICE in the *Adames* case and found that there were major differences in the information provided to each purchaser. *Id.* In *Swarovski*, the language provided specific notice that the photographic equipment is under United States Munitions List Category Number XIII (a) and as such must be licensed by the U.S. Department of State prior to export from the United States. *Id.* Judge Scott found that this language provided notice as to specific

equipment involved, the specific regulation involved and specific requirements which must be satisfied prior to export. *Id.* In short, Judge Scott stated, "[the notice] provided the purchaser with knowledge without a license particular property that is restricted by the Munitions List." *Id.* Applying this standard, Judge Scott concluded that the EXPORT NOTICE provided to Adames did not convey sufficient knowledge to meet the specific intent requirement. *Id.* Thus, the only question remaining was whether the other attending facts, taken in combination with the export notice, were sufficient to generate a jury issue. *Id.* Judge Scott found that the other circumstances were legally insufficient. *Id.*

In the case at hand, the written notice provided by the Government's pro forma invoice falls short of the *Swarovski* standard and is more in line with *Adames'* insufficient notice. When you remove all the regulatory language, the *Adames'* notice simply states that **"Certain Products may not be exported from the U.S.A. without specific approval from the Department of Commerce ... It is the BUYER'S responsibility, not the SELLER'S, to obtain such licensing."** Our notice states **"Export of the commodities described herein is strictly prohibited without a valid export license issued by the U.S. State Department, Office of Defense Trade Controls."** Both notices have a reference to ITAR and licensing. The only difference is that the *Adames* notice references "certain items" while the notice in this case references "commodities referenced

herein." Neither notice is specific as to what is being referenced to as they are in the *Swarovski* notice; nor do they specifically reference the USML as does the *Swarovski* notice. As such, the only notice provided to the defendant in this case does not sufficiently advise of an unlawful act.

The Fifth Circuit held that the written warning in this case was closer to the written warning in *United States v. Swarovski,* 592 F.2d 131 (2d Cir. 1979) than to the written warning in *United States v. Adames*, 683 F. Supp. 255 (USDC (Fla.) 1988), *aff'd*, 878 F.2d 1374 and therefore was sufficient. (Appendix A pg. 15). Specifically, the Fifth Circuit held that the language in Caldwell's warning, which stated "a valid export license issued by the U.S. State Department, Office of Defense Trade Controls," was more specific than *Adames* warning which stated "specific approval from the Dept. of Commerce . . . and/or Dept. of State." (Appendix A pg. 16). Based on this distinction, and that the warning covered "the contents of the invoice," the Fifth Circuit held that this notice, coupled with the petitioner's admission to reading it, was sufficient to infer specific intent to violate the regulation. (Appendix A pg. 16). However, this distinction is wrong in that there is no difference between the two phases other than the usage of different words which convey the same meaning. Additionally, the Fifth Circuit admits that while the warning covered "the contents of the invoice," the warning in its description of the contents within the pro forma warning "did not list the specific USML category covering the items in

question (as did the *Swarovski* warning)." (Appendix A pg. 16). This is where the split in authority is created.

CONCLUSION

The decision of the Fifth Circuit has created a split in the law regarding the exportation of USML items and the necessary specific intent required to violate 22 U.S.C. § 2778(b)(2), especially if the Government is to rely on written notices to provide warnings, when later disregarded, provide the necessary evidence of the specific intent to violate Section 2778(b)(2).

DATED: February 4, 2008

Respectfully submitted,

LOUIS ELIAS LOPEZ, ESQ.

Attorney for Petitioner
Robert Thomas Caldwell

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-51392

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ROBERT THOMAS CALDWELL

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:07-CR-249-3

(Filed Oct. 9, 2008)

Before DAVIS, CLEMENT, and ELROD, Circuit Judges.

DAVIS, Circuit Judge:*

Defendant-Appellant Robert Thomas Caldwell appeals from the district court's denial of his motion for judgment of acquittal, following his conviction on

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

one count of attempting to export and aiding and abetting the attempted export of defense articles in violation of certain export control regulations. In addition, he appeals from his sentence of 20 months' imprisonment. Because we find that the evidence was sufficient to convict and that the sentence imposed was not unreasonable, we affirm.

I. BACKGROUND

This case centers around the attempted unlicensed export of certain single-use batteries, designed for use in HAWK missile systems, in violation of the Arms Export Control Act (AECA), 22 U.S.C. § 2778(b)(2) and (c), and the associated International Traffic in Arms Regulations (ITAR), 22 C.F.R. §§ 120.1-120.32. It is undisputed that the batteries in question are covered by the United States Munitions List (USML), 22 C.F.R. §§ 121.1-121.16, as "defense articles." The export of USML defense articles must be licensed pursuant to 22 C.F.R. §§ 123.1-123.17, and failure to do so constitutes a violation of 22 U.S.C. § 2778 and 22 C.F.R. §§ 127.1-127.12. Collectively, we refer to the relevant AECA and ITAR provisions as the "export control regulations."

This case arose from a sting operation designed and carried out by the United States Bureau of Immigration and Customs Enforcement (ICE), in which it established a fake company, Mercury Global, in El Paso, Texas. Chris Tappin, a British businessman, contacted Mercury Global in December of 2005

through a representative in the United States, seeking the unlicensed export of a USML-listed camera and USML-listed HAWK missile batteries, all in violation of the export control regulations. He agreed to pay $5,000 apiece – $2,000 above retail price – for 50 batteries. During these negotiations, Tappin and the undercover agents discussed the specifics of the plot, including the use of double (*i.e.*, false) invoices.

The undercover agents stopped the first attempted shipment by arresting one of Tappin's representatives in the United States. The agents informed Tappin that the shipment had encountered problems at customs in New York, necessitating a change of plans for any future shipment. Mercury Global then contacted Southeast Overseas, another shipping company, regarding possible participation, but Southeast declined to join in when it learned of the licensing issues. At that point, Tappin informed Mercury Global that it would be contacted by Caldwell, an Oregon fertilizer importer, who would purchase the batteries on Tappin's behalf and ship the batteries to Tappin in the United Kingdom via Murphy Shipping Company located in Houston, Texas.

Here the stories told by Caldwell and the government diverge. Caldwell asserts that the undercover agents at Mercury Global never clearly discussed the licensing requirements and illegal plot with him, as they had with Tappin's representative, Tappin himself, and Southeast Overseas. Instead, Caldwell claims, the government agents only referred to the licensing requirements in boilerplate language

on a pro forma invoice and otherwise never explicitly discussed the illegal nature of what they were doing. Caldwell claims the government agents assumed Tappin would tell him about the illegality of shipping without a license, but Tappin never did. In short, Caldwell asserts that he never really knew about the export control regulations.

The government, however, points to excerpts from various conversations between Caldwell and undercover agents at Mercury Global, faxes sent by Caldwell, and the pro forma invoice mentioned above. On December 20, 2006, an undercover agent asked Caldwell, "[Y]ou do know about the licensing issues involved with this, correct? Did he explain that to you?" Caldwell replied, "You know, that's something I am not quite . . . familiarized with. . . ." The agent then said that "the biggest issue is the . . . licensing issues" and discussed structuring the transaction as a domestic sale with subsequent export, provided "you have a company and . . . you've done this in the past where . . . you can . . . [m]ove things out . . . without it being scrutinized." Caldwell responded, "Well, . . . I'm not . . . totally hip on all the . . . issues at hand, but . . . we've done things in the past and it's just . . . easier to have . . . agents and . . . domestic purchases and domestic exports . . . for some of our projects."

Caldwell then faxed Tappin some questions regarding "other parameters," stating, "Such issues could not freely discuss [sic] on the phone." The government presented evidence that, during Caldwell's subsequent phone conversation with Tappin, he

wrote down the words "batteries," "trucks," and "military." During a December 28, 2006, conversation, an undercover agent referenced "the sensitivity of the items," while Caldwell stated that "I want to protect you and your enterprise . . . from anything." In the same conversation, Caldwell later stated, "Yeah, I mean all the paperwork. . . . I understand totally. I understand." The two made plans to meet in January of 2007 in San Antonio.

On January 3, 2007, the undercover agent contacted Caldwell regarding a pro forma invoice that the agent was faxing over. Caldwell was instructed to maintain double invoices, keeping the "actual one" (*i.e.*, the one with the USML-listed HAWK missile batteries and true purchase price) for his records but a false invoice with a "devalued description" "[s]o that it won't raise any red flags" in a possible inspection. On January 4, Caldwell received a pro forma invoice listing five "GAP-4328" "inert zinc/silver oxide reserve batteries" and containing the following notice:

> Export of the commodities described herein is strictly prohibited without a valid export license issued by the U.S. State Department, Office of Defense Trade Controls, prescribed in the International Traffic in Arms Regulations (ITAR), Title 22, Code of Federal Regulations, Parts 120-130.

This is the same notice Caldwell attacks on appeal. The government showed that Caldwell faxed the pro forma invoice to Tappin with an asterisk next to it and a note directing him to "please see detail below."

On January 8, Caldwell sent a purchase order to Mercury Global for five batteries, listing Caldwell as the purchaser and directing Mercury Global to ship the product to Murphy Shipping in Houston, Texas. This false invoice did not name the USML-listed batteries but instead listed the batteries as "Tideland Gap inert non-spillable reserve batteries."

Caldwell met with the undercover agent in San Antonio on January 25, 2007, and they discussed the plan. Caldwell stated, "I still have a bit of trepidation about some of the possible liabilities. . . ." The agent asked, "With these items . . . my biggest concern is . . . now you're not going to file for an export license on these, correct?" Caldwell replied, "I hadn't planned on it." Caldwell later mused, "I just don't feel like I'm completely comfortable with all of the different features of this thing but . . . I mean it sounds like it's . . . can be done pretty easily and . . . [w]ithout . . . , you know, raising too many flags. And you know, I don't . . . the thought of, you know, something that is potentially illegal isn't cool. But I don't see it being, I mean. . . ."

The government showed that, later at the same meeting, Caldwell explained his plans to circumvent the export control regulations by disguising the USML-listed batteries as non-USML-listed batteries manufactured by Tideland Signal Corporation, and shipping them overseas to Tappin through Murphy Shipping. Caldwell then gave the agent a $5,000 check and directed the agent to send the batteries to Murphy Shipping in Houston, at which point Murphy

would forward the batteries to the United Kingdom. Before the meeting ended, Caldwell was arrested. In his possession were various documents relating to the transaction, including the pro forma invoice, faxes, and false purchase orders for Tideland batteries.

On February 7, 2007, Caldwell was charged with one count of conspiracy to violate the export control regulations, and one count of attempting to export and aiding and abetting the same. At trial, a Murphy Shipping representative testified that both Tappin and Caldwell made shipping arrangements for "Tideland batteries," never mentioning Mercury Global and never supplying the pro forma invoice with the true description of the batteries. Further testimony established that the batteries at issue were USML-listed, and Tideland did not manufacture or sell that type of battery. Caldwell testified and admitted that Tappin told him of the batteries' military application; he also admitted to seeing the "export warning" on the pro forma invoice. At the close of evidence, the district court denied Caldwell's motion for judgment of acquittal. The jury acquitted Caldwell on the conspiracy count and convicted him on the count of attempting export and aiding and abetting the same.

Prior to sentencing, the Probation Department's presentence report (PSR) calculated Caldwell's criminal history category at I, with a base offense level of 24, based on an original offense level of 26 with a two-level reduction for his minor role in the offense. The Probation Department declined to amend the PSR in response to Caldwell's objection to the description of

the offense conduct and argument that he should receive a four-level reduction for his minimal role. At sentencing, the district court sustained Caldwell's objection concerning the mitigating role adjustment, lowering the relevant offense level to 22 and calculating the resulting advisory Guidelines range at 37 to 46 months, which Caldwell admitted was properly calculated.

Caldwell also requested an aberrant behavior departure pursuant to U.S. SENTENCING GUIDELINES MANUAL § 5K2.20 and sought a significant departure from the Guidelines range in that he sought probation only. The court declined to sentence Caldwell to probation only, stating that "even if I were to consider a sentence outside the guideline range, . . . going to probation would probably be – that's too much of a departure. There's no doubt that it would come back if the Government appealed it." However, the court did find that Caldwell was entitled to the aberrant behavior departure under § 5K2.20, sentencing him to 20 months' imprisonment, followed by two years of supervised release and 150 hours of community service, as well as imposing a $100 special assessment.

Caldwell's appeal focuses on three claims of error concerning the district court's denial of his motion for judgment of acquittal, all centering on the sufficiency of the evidence, and one claim of error regarding the reasonableness of his sentence.

II. SUFFICIENCY OF THE EVIDENCE CLAIMS

Caldwell's first three claims of error assert that the district court erred by not granting his motion for judgment of acquittal because there was insufficient evidence to show: that he acted with specific intent to violate a known duty, that he willfully attempted export without a license, or that he aided and abetted the unlicensed export. These claims center on only two arguments: (1) that the government presented insufficient evidence that Caldwell possessed the specific intent to violate a known legal duty, and (2) that the government presented insufficient evidence that Caldwell actually attempted to export the batteries in question, because he was arrested before the batteries reached the point of export.

> When an insufficiency-of-the-evidence claim of error is properly preserved through a motion for judgment of acquittal at trial, it is reviewed *de novo*. [*United States v. Ragsdale*, 426 F.3d 765, 770 (5th Cir. 2005)]. Under that standard, "'[w]e will affirm . . . if a reasonable trier of fact could conclude . . . the elements of the offense were established beyond a reasonable doubt, viewing the evidence in the light most favorable to the verdict and drawing all reasonable inferences from the evidence to support the verdict'". *Id.* at 770-71 (quoting *United States v. Floyd*, 343 F.3d 363, 370 (5th Cir. 2003)).
>
> * * *
>
> To preserve *de novo* review, . . . a defendant must specify at trial the particular basis on

> which acquittal is sought so that the Government and district court are provided notice.

United States v. McDowell, 498 F.3d 308, 312 (5th Cir. 2007). Here, Caldwell did raise the three specific bases for his insufficient evidence claims at the district court. Thus, Caldwell is entitled to *de novo* review of his motion for judgment of acquittal.

A. Applicable Law

The count of the indictment on which Caldwell was convicted alleged that he "attempted to export and aided and abetted the attempted export from the United States of defense articles . . . in violation of Title 22, United States Code, Section 2778(b)(2) and 2778(c), and Title 22, United States Code of Federal Regulations, Sections 121.1, 121.4, 123.1[,] 127.1(a), 127.1(c) and 127.3; Title 18, United States Code, Section 2."

Section 2278(b)(2) provides, in relevant part, that "no defense articles or defense services designated by the President under subsection (a)(1) of this section may be exported or imported without a license for such export or import, issued in accordance with this chapter and regulations issued under this chapter. . . ." 22 U.S.C. § 2778(b)(2). Defense articles are itemized in the USML. 22 C.F.R. § 121.1-121.16. The criminal penalties for violating § 2778(b)(2) are found in § 2778(c), which provides: "Any person who willfully violates any provision of this section or section

2779 of this title, or any rule or regulation issued under either section, . . . shall upon conviction be fined for each violation not more than $1,000,000 or imprisoned not more than ten years, or both." 22 U.S.C. § 2778(c).

The general requirements for conviction under these sections are well established and are not disputed by the parties here.

> To sustain a conviction under 22 U.S.C. § 2778, the government must prove beyond a reasonable doubt that the defendant willfully exported or attempted to export defense articles that are on the United States Munitions List without a license. Hence, the statute requires the government to prove that the defendant acted with specific intent to violate a known legal duty.

United States v. Covarrubias, 94 F.3d 172, 175 (5th Cir. 1996) (citations omitted). "The government may use both direct and circumstantial proof, and the jury may infer willful violation of a known legal obligation from facts and circumstances surrounding the case." *United States v. Dien Duc Huynh,* 246 F.3d 734, 743 (5th Cir. 2001) (internal quotations and citations omitted).

Caldwell's indictment raises issues relating to both aiding and abetting as well as attempt. Aiding and abetting liability comes from 18 U.S.C. § 2, which provides, in relevant part: "(a) Whoever commits an offense against the United States or aids, abets,

counsels, commands, induces or procures its commission, is punishable as a principal."

> A conviction for aiding and abetting under 18 U.S.C. § 2(a) requires the government to establish that the defendant wilfully associated himself in some way with the criminal venture and wilfully participated in it as he would in something he wished to bring about. *United States v. Fischel,* 686 F.2d 1082, 1087 (5th Cir. 1982). "Association means that the defendant shared in the criminal intent of the principal. Participation means that the defendant engaged in some affirmative conduct designed to aid the venture." *United States v. Colwell,* 764 F.2d 1070, 1072 (5th Cir. 1985). *See United States v. Westbo,* 746 F.2d 1022, 1025 (5th Cir. 1984).

United States v. Ortiz-Loya, 777 F.2d 973, 980 (5th Cir. 1985).

Finally,

> [t]he crime of attempt requires the Government to prove that the defendant (1) intended to commit the underlying offense, and (2) took a 'substantial step,' beyond mere preparation, toward committing that crime. Liability for attempt attaches if the defendant's actions have proceeded to the point where, if not interrupted, [they] would culminate in the commission of the underlying crime.

United States v. Polk, 118 F.3d 286, 291 (5th Cir. 1997).

B. Specific Intent

Here, Caldwell asserts that the evidence was insufficient with respect to his specific intent to violate a known legal duty – and thus to join in the criminal intent of the principal, Tappin – because the government failed to supply proof that Caldwell was instructed or informed by anyone that exporting the batteries without a license would violate the law. Caldwell argues that the government's entire case centers on insufficient boilerplate language in an export warning on a pro forma invoice provided to him by an undercover agent. Significantly, Caldwell testified at trial to seeing that export warning, and although he now mentions the asterisk he placed on the fax, he does not state that he faxed the pro forma invoice to Tappin with a note directing Tappin to "please see detail below."

In attacking the sufficiency of the export warning, Caldwell principally relies on *United States v. Adames,* 683 F. Supp. 255 (S.D. Fla. 1988), *aff'd,* 878 F.2d 1374 (11th Cir. 1989), in which the district court granted the defendant's Rule 29 motion for judgment of acquittal following her jury conviction on three counts of violating 22 U.S.C. § 2778 – one conspiracy count and two aiding and abetting counts. FED. R. CRIM. P. 29. Because the defendant had neither been told of the licensing requirements nor "was an expert or knowledgeable about licensing and arms shipping requirements," *Adames,* 683 F. Supp. at 257, the government's proof of specific intent to violate a known legal duty hinged on written notice – specifically, an

export notice stamped on a sales receipt for firearms, which read in full:

> EXPORT NOTICE
>
> Certain Products may not be exported from the U.S.A. without specific approval from the Dept. of Commerce (Part 370. Export Administration Regulations) and/or Dept. of State (Title 22, Parts 121-128. (ITAR)). It is the BUYER'S responsibility, not the SELLER'S, to obtain such licensing unless agreed otherwise.

Id. at 256-57.

The government contended that this warning at least put the defendant on inquiry notice of the licensing requirement. *Id.* at 257. The district court disagreed, relying on the only other case it could find involving written notice, *United States v. Swarovski,* 592 F.2d 131 (2d Cir. 1979). The *Swarovski* notice read in full:

> ABOVE ITEMS ARE OF U.S.A. ORIGIN AND MANUFACTURE. ABOVE PHOTOGRAPHIC EQUIPMENT IS UNDER UNITED STATES DEPARTMENT OF STATE MUNITIONS LIST CATEGORY NUMBER XIII(a), AND AS SUCH MUST BE EXPORT LICENSED BY THE U.S. DEPARTMENT OF STATE PRIOR TO EXPORT FROM THE UNITED STATES.

Id. at 133.

The district court found "major differences" between the *Adames* warning and the *Swarovski*

warning: the *Adames* warning "fails to specify the equipment, regulation and requirements needed to export the article. In short, it does not provide the purchaser with knowledge that it was unlawful to export the handguns outside the United States without State Department approval." *Adames,* 683 F. Supp. at 258. The district court in *Adames* concluded that the export warning "does not convey sufficient knowledge to meet the specific intent requirement," and the government otherwise had not presented sufficient proof of specific intent; accordingly, the court granted the defendant's motion for judgment of acquittal. *Id.* The Eleventh Circuit affirmed, without citing or otherwise discussing *Swarovski,* finding:

> The evidence demonstrates, at most, that Adames was negligent in not investigating the legal prerequisites to the exportation of firearms. . . . Though it reasonably could be inferred from Adames' suspicious conduct that she was aware of the generally unlawful nature of her actions, that state of mind is insufficient to sustain a finding of guilt under a statute requiring specific intent.

Adames, 878 F.2d at 1377.

Here, Caldwell argues that the export warning on the pro forma invoice is closer to the *Adames* warning than to the *Swarovski* warning. We disagree. The export warning in this case was located on a pro forma invoice itemizing *only* USML-listed batteries. Although the pro forma warning itself does

not explicitly refer to the batteries (as the *Swarovski* warning did with the reference to "photographic equipment"), the warning here plainly applies to "the commodities described herein," and the invoice listed only the batteries in question. This warning is unlike the *Adames* warning, which referred only to "certain products" and did not tie the warning to the specific products on the sale receipt in any way. Although the pro forma warning does not list the specific USML category covering the items in question (as did the *Swarovski* warning), the warning here does specifically refer to the need for a "valid export license issued by the U.S. State Department, Office of Defense Trade Controls." This is more specific than the *Adames* warning's "specific approval from the Dept. of Commerce . . . and/or Dept. of State" language. *Adames,* 683 F. Supp. at 256-57.

Ultimately, the export warning in this case is closer to the *Swarovski* warning in that it is specific with respect to the items covered and the State Department export licensing requirement. Although the warning in this case does not specify the precise USML provision that covers the defense articles at issue, the warning clearly covers the contents of the invoice and sets out the regulatory basis for the requirements.

Of course, *Adames* focuses solely on the written notice because there was no other evidence to prove specific intent in that case. Here, the written warning is certainly a major part of the government's proof, but the government presented ample other evidence

in support of specific intent, such as transcripts of conversations between Caldwell and undercover agents, and faxes exchanged between Caldwell and Tappin. It is the totality of the evidence that controls.

Caldwell points to alleged holes in the government's evidence: that the undercover agents did not explicitly tell Caldwell about the batteries and did not know what Tappin had told him; that the undercover agents were not as explicit in their dealings with Caldwell as they had been with Tappin, Tappin's former U.S. representative, and Overseas Shipping; and that an undercover agent testified that Caldwell was not going to be told that the items would actually be exported without an export license. What Caldwell does not address is the substantial record evidence of his knowledge of the licensing requirement and the ultimate destination of the batteries.

Under the applicable standard of review, we must affirm the district court's denial of the motion for judgment of acquittal if "'a reasonable trier of fact *could* conclude . . . the elements of the offense were established beyond a reasonable doubt,'" *McDowell,* 498 F.3d at 312 (quoting *United States v. Ragsdale,* 426 F.3d 765, 770-71) (emphasis added). Caldwell's conviction did not depend on the export warning alone, although that warning alone is arguably sufficient, and Caldwell testified to seeing it.

The government presented ample evidence at trial that Caldwell both knew of the export control regulations' licensing requirements and chose to

circumvent them. Caldwell's own communications to undercover agents revealed that he intended to use double invoices, misleading packaging, and omissions in his communications with Murphy Shipping to export the batteries to the United Kingdom without first obtaining the required export license. The test is not whether the jury could have chosen Caldwell's account of the circumstances, but whether their choice to convict was supported by sufficient evidence, "viewing the evidence in the light most favorable to the verdict and drawing all reasonable inferences from the evidence to support the verdict." *Id.* Under that standard, we find that there is sufficient evidence for a reasonable jury to find that Caldwell possessed the specific intent to violate a known legal duty – the licensing requirements of the export control regulations.

C. Attempt

Caldwell also argues that there was insufficient evidence to show he attempted to actually export the batteries. This argument is based on the fact that the shipment was arranged in two parts, the first to Murphy Shipping in Houston, the second from Murphy Shipping to the United Kingdom. Caldwell claims that because he was arrested before the batteries had begun the second part of the trip, he was arrested before the export licenses were required and before he gave Murphy Shipping any deceptive instructions regarding shipment out of the United States.

Again, Caldwell fails to adequately address the substance of the evidence on which the jury could rely. Caldwell concedes that he took steps to ship the batteries and stated his intent not to obtain export licenses, although he claims his statement was made only in reference to the shipment to Houston. The government, however, presented a great deal of evidence of Caldwell's plans to disguise the batteries by means of false documentation and packaging, as well as evidence that once the batteries were en route to Murphy Shipping in Houston, Texas, he would need to do nothing else for the batteries to be exported from the United States to the United Kingdom.

Actual export is not required for a violation of 22 U.S.C. § 2778. *See United States v. Castro-Trevino,* 464 F.3d 536, 542 (5th Cir. 2006) ("Indeed, we have on at least two occasions affirmed convictions of violating section 2778 by *attempted* exportation of defense articles on the United States Munitions List without a license." (emphasis in original)) (citing *Covarrubias,* 94 F.3d 172; *Ortiz-Loya,* 777 F.2d at 978, 980). In *Covarrubias,* the defendant was arrested on the United States side of the border with Mexico and was convicted under § 2778 for attempting to violate the export control regulations. 94 F.3d at 172-73. The Fifth Circuit affirmed the defendant's conviction based on the "ample evidence" supporting the jury's verdict, *e.g.,* concealing weapons in the gas tank of his truck and admitting that he had no intention of declaring the concealed weapons to authorities in

either country because he knew the transport was illegal. *Id.* at 175. *Ortiz-Loya* involved similar facts – concealed weapons and an arrest on the United States side of the Mexican border – and the same result. 777 F.2d at 980.

These cases under 22 U.S.C. § 2778 conform with the general standards for attempt, which require only an intent to commit the underlying offense and a "substantial step" beyond preparation. *Polk,* 118 F.3d at 291 (citing *United States v. Mandujano,* 499 F.2d 370, 376 (5th Cir. 1974)). "Liability for attempt attaches if the defendant's actions have proceeded to the point where, if not interrupted, would culminate in the commission of the underlying crime." *Id.*; *see also Ortiz-Loya,* 777 F.2d at 980 ("It is not necessary to reach a point of irrevocable commitment in order to be convicted of attempted exportation in violation of 22 U.S.C. § 2778.") (citing *Samora v. United States,* 406 F.2d 1095, 1096 (5th Cir. 1969)).

We have already found that the evidence supports the jury's implicit finding of specific intent, leaving only the "substantial step." The government presented evidence and testimony at trial that the plan for Murphy Shipping to forward the batteries to the United Kingdom was already set, that the division between the domestic leg of the shipment and the export leg was not the clear point of division Caldwell asserts, and that Caldwell had reiterated his plans to circumvent the licensing requirements immediately before paying for the batteries and directing the undercover agent to send them to

Murphy Shipping. Based on the evidence presented, the jury could conclude, beyond a reasonable doubt, that Caldwell attempted to violate the export control regulations.

III. SENTENCING CLAIM

For his final claim of error, Caldwell asserts that the district court erred by applying an incorrect presumption when sentencing him. In *Gall*, the Supreme Court explained the standard of review for sentencing as follows:

> Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [18 U.S.C.] § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the

> circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance.

Gall v. United States, 128 S. Ct. 586, 597 (2007) (citation omitted). Because Caldwell concedes that the district court's sentence is procedurally sound, we review only the substantive reasonableness of the sentence under the abuse of discretion standard.

Caldwell's appeal focuses on the fact that, prior to *Gall,* "certain of [the Fifth Circuit's] opinions have arguably supported the view, rejected in *Gall,* that we may, at least in certain instances, require district courts to find extraordinary circumstances before they impose sentences outside of the guidelines range." *United States v. Rodriguez-Rodriguez,* 530 F.3d 381, 388 (5th Cir. 2008) (citing *United States v. Williams,* 517 F.3d 801, 811 (5th Cir. 2008)). Caldwell argues that the district court relied on this earlier standard, which resulted in a longer sentence.

In this case, the properly calculated Guidelines range was 37 to 46 months of incarceration, after the district court sustained one of Caldwell's objections to

the PSR and lowered the base offense level by two levels, to 22. The district court also granted Caldwell's request for an aberrant behavior departure pursuant to U.S. SENTENCING GUIDELINES MANUAL § 5K2.20, but declined to impose a probation-only sentence, stating that probation would be "too much of a departure" and likely overturned on appeal. However, the district court then imposed a sentence well below the Guidelines range, sentencing Caldwell to 20 months of incarceration.

Caldwell did not object to the final imposition of sentence at the district court. The posture of this case is thus similar to this court's recent decision in *Rodriguez-Rodriguez,* in which the defendant argued a similar point on appeal based on this Circuit's post-*Booker,* pre-*Gall* case law. In *Rodriguez-Rodriguez,* we explained:

> Even if we assume *arguendo* that *Gall* has now rendered certain prior aspects of our post-*Booker* jurisprudence not only erroneous but also plainly so, there is absolutely nothing to indicate that any such state of affairs influenced the sentence imposed in this case, and certainly affirmance of the instant sentence would not seriously adversely affect the fairness, integrity or public reputation of judicial proceedings. Neither the district court, nor the PSR, nor counsel for the government, nor defense counsel, ever stated or took the position below that any sentence less than 57 months [at the bottom of the Guidelines range] would be presumed to be

> legally erroneous or that such a sentence could only be imposed if the case presented extraordinary circumstances, not considered, or inadequately considered, by the guidelines. . . .
>
> * * *
>
> Appellant is not entitled to resentencing under the argument, not raised below, that his sentencing was under a regime of this court's post-*Booker* jurisprudence that amounted to "essentially a restatement of the sentencing regime struck down in *Booker*."
>
> The district court committed no procedural error under *Gall*. We accordingly review the sentence under an abuse-of-discretion standard for substantive reasonableness.

530 F.3d at 388-89 (footnotes omitted).

Here, the district court made a reference to being reversed if it imposed a sentence of probation only and prefaced that remark with the clause "even if I were to consider a sentence outside the guideline range." Superficially, this suggests the district court felt constrained in sentencing Caldwell. However, the district court actually made a significant downward departure from the Guidelines range, unlike the court in *Rodriguez-Rodriguez*. This tempers any strict interpretation of the district court's lead-in clause, since the court not only "consider[ed] a sentence outside the guideline range" but actually *imposed* such a sentence. Clearly, the district court was not, in fact, constrained by the advisory Guidelines range.

Also, no one at sentencing referred to "extraordinary circumstances" or made other statements suggesting that this Circuit's pre-*Gall* standards were the guiding principles under consideration. Importantly, even after *Gall,* sentences outside of the Guidelines range are reviewed for reasonableness, and "appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines" in making that determination. *Gall,* 128 S. Ct. at 595. Thus, the district court's statement does not reveal any conflict with *Gall.*

It is also important to note that Caldwell filed a memorandum at the district court seeking only a reasonable sentence below the advisory Guidelines range, because "[a] prison sentence below the guideline range is a significant sentence for this type of crime, and is sufficient to provide just punishment while promoting respect for the law." At no point in his memo did Caldwell explicitly seek a sentence of probation, only a lesser period of incarceration than the Guidelines range. (He did, however, argue for a sentence of probation at sentencing in open court.) Thus, he is now arguing that a sentence he sought and did not object to at the district court – a lesser sentence than the advisory Guidelines range – is unreasonable.

Caldwell concedes that the imposition of his sentence is procedurally sound, and the record bears that out. We further find that the below-Guidelines sentence imposed in this case is not unreasonable,

particularly in light of Caldwell's failure to raise his particular objection at the district court.

CONCLUSION

For the reasons stated above, the district court's judgment is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	**CRIMINAL NO. EP-07-CR-0249-DB**
ROBERT THOMAS CALDWELL,	)	
Defendant.	)	

ORDER

(Filed Jul. 19, 2007)

On this day, came on to be considered Defendant's Motions for Judgment of Acquittal and New Trial, and the Government's response, the [sic] is of the opinion that Defendant's Motions should be in all things denied.

IT IS THEREFORE ORDERED that Defendant's Motion for Judgment of Acquittal and Motion for New Trial in this cause is hereby DENIED.

SIGNED AND ENTERED this 19th day of July, 2007.

/s/ David Briones
DAVID BRIONES
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
Western District of Texas
EL PASO DIVISION

UNITED STATES OF AMERICA

v.

ROBERT THOMAS CALDWELL

Defendant.

Case Number EP-07-CR-249-DB(3)
USM Number 82883-180

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Nov. 9, 2007)

The defendant, ROBERT THOMAS CALDWELL, was represented by Louis Lopez.

The defendant has been found not guilty on Count 1 and is discharged as to such Count.

The defendant was found guilty to Count 2 by a jury verdict on July 22, 2007 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such Count, involving the following offense:

Title & Section	Nature of Offense	Offense Ended	Count(s)
22 U.S.C. 2278 and 18 U.S.C. 2	Aiding and abetting the Illegal Export of Defense Articles	1-25-2007	2

As pronounced on November 9, 2007, the defendant is sentenced as provided in pages 2 through 6 of

this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for the district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the 9th day of November, 2007.

/s/ David Briones
DAVID BRIONES
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 20 months.

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant serve this sentence at a camp facility nearest to Portland, Oregon.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons at or before 2:00 PM on January 11, 2008.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 years.

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court as set forth on pages 4 and 5 of this judgment.

CONDITIONS OF SUPERVISION

Mandatory Conditions:

1) The defendant shall not commit another federal, state, or local crime.

2) The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and

at least two periodic drug tests thereafter, as determined by the court.

3) In supervised release cases only, the defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

4) If convicted of a felony, the defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

5) The defendant shall cooperate in the collection of DNA as directed by the probation officer if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 1413a).

6) If convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4), the defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer.

7) If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.

8) If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.

Standard Conditions:

1) the defendant shall not leave the judicial district without permission of the court or probation officer.

2) The defendant shall report to the Probation Officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the Probation Officer and follow the instructions of the Probation Officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation, unless excused by the Probation Officer for schooling, training or other acceptable reasons.

6) The defendant shall notify the Probation Officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall

not associate with any person convicted of a felony unless granted permission to do so by the Probation Officer.

10) The defendant shall permit a Probation Officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the Probation Officer.

11) The defendant shall notify the Probation Officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the Court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) If convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4), or has a prior conviction of a State or local offense that would have been an offense as described in 18 U.S.C. § 4042(c)(4) if a circumstance giving rise to Federal jurisdiction had existed, the defendant shall participate in a sex offender treatment program approved by the probation officer. The defendant shall abide by all program rules, requirements and conditions of the sex offender treatment program, including submission to polygraph testing, to determine if

the defendant is in compliance with the conditions of release. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based on the defendant's ability to pay.

15) The defendant shall submit to an evaluation for substance abuse or dependency treatment as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a program approved by the probation officer for treatment of narcotic addiction or drug or alcohol dependency which may include testing and examination to determine if the defendant has reverted to the use of drugs or alcohol. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

16) The defendant shall submit to an evaluation for mental health counseling as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a mental health program approved by the probation officer. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

17) If the defendant is excluded, deported, or removed upon release from imprisonment, the term of supervised release shall be a non-reporting term of supervised release. The defendant shall

not illegally re-enter the United States. If the defendant lawfully re-enters the United States during the term of supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

18) If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.

19) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.

20) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the payment schedule.

The Court further adopts such of the following special conditions applied to the supervised person by the judge at the time of sentencing:

1) **COMMUNITY CONFINEMENT:** The defendant shall reside in a Community Corrections Center for a period of 0 months to commence on _____. Further, once employed, the defendant shall pay 25% of his/her weekly gross income for his/her subsistence as long as that amount does not exceed the daily contract rate.

2) **HOME DETENTION:** The defendant shall participate in the Home Confinement Program for a period of 0 days/months. During this time the defendant shall remain at his/her place of residence except for employment and other activities approved in advance by the probation officer. The defendant shall maintain a telephone at his/her place of residence without "call forwarding," a "modem," "caller ID," "call waiting," or portable cordless telephones for the above period. At the direction of the probation officer, the defendant shall wear an electronic monitoring device and follow electronic monitoring procedures specified by the probation officer. The court further orders that the defendant shall pay for the costs of Home Confinement, as directed by the probation officer.

3) **COMMUNITY SERVICE:** The defendant shall perform **150** hours of community service work without pay, at a location approved by the probation officer, at a minimum rate of four hours per week, to be completed during the term of supervision.

CRIMINAL MONETARY PENALTIES/SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. Criminal Monetary Penalties, except those payments made through

Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 511 E. San Antonio Street, Room 219 El Paso, Texas 79901.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

	Total Assessment	Fine	Restitution
TOTAL:	$100.00	$0	$0

Special Assessment

It is ordered that the defendant shall pay to the United States a special assessment of $100.00. Payment of this sum shall begin immediately.

Fine

The fine is waived because of the defendant's inability to pay.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column above. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-51392

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

ROBERT CALDWELL
Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas, El Paso

(Filed Nov. 10, 2008)

ON PETITION FOR REHEARING EN BANC

(Opinion 10/9/08, 5 Cir., ___, ___ F.3d ___)

Before DAVIS, CLEMENT, and ELROD, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En

Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

22 U.S.C. § 2778(b)(2)

Except as otherwise specifically provided in regulations issued under subsection (a)(1) of this section, no defense articles or defense services designated by the President under subsection (a)(1) of this section may be exported or imported without a license for such export or import, issued in accordance with this chapter and regulations issued under this chapter, except that no license shall be required for exports or imports made by or for an agency of the United States Government (A) for official use by a department or agency of the United States Government, or (B) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means.